IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1199

CHRISTIAN J. JANSEN, JR.,
Petitioner,

vs.

C. MARSHALL DANN,
COMMISSIONER OF PATENTS AND TRADEMARKS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

John Cameron McNett
111 Monument Circle
Indianapolis,
Indiana 46204
(317) 634-3455

Attorney for Petitioner

OF COUNSEL
WOODARD, WEIKART, EMHARDT & NAUGHTON

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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The respondent sets forth petitioner's argument as follows: (Resp. 3):

> "Petitioner argues here, however, that a controversy existed over the safety of using the ingredients in combination that rendered his proposal nonobvious."

This is misleading for two reasons. First, petitioner's arguments of non-obviousness in his petition are grounded mainly on the actual improved safety of the claimed com-

position. They are not principally grounded on any controversy that followed the invention and which may relate to predictions concerning the safety of the claimed composition. The actual improved safety, measured in terms of sickness prevented and lives saved, is the essence of the measure of progress within the useful arts. The record shows that prior art products are accompanied with the risk of sickness and death, due either to too much folic acid causing masking or too little folic acid allowing folic acid deficiency to occur. In contrast, petitioner's product prevents both masking and folic acid deficiency. Neither the court below nor the Patent and Trademark Office Board of Appeals has challenged these facts. Secondly, *none* of the facts of record relating to the controversy over the predicted safety of petitioner's invention by others occurred *before* the date of petitioner's invention. The controversy surrounding the introduction of the patentable invention in *United States v. Adams* (facts cited Pet. 8) illustrates that controversy following the introduction of an invention can support a determination of unobviousness. The respondent's citation of *Dann v. Johnston* (Resp. 3) is inapposite.

It is clear that the court below did consider the facts relating to the *controversy* concerning *other's predictions* of safety which followed the introduction of petitioiner's novel invention. In a manner which could be argued to be inconsistent with 35 U.S.C. §103, the court below discussed the controversy as follows (Pet. App. A-16):

> "Whether members of the medical community agree or disagree with appellant's "shotgun approach" to treating undifferentiated anemia cannot control the determination of whether appellant's claimed combination product and method would have been unobvious to a person having ordinary skill in the art."

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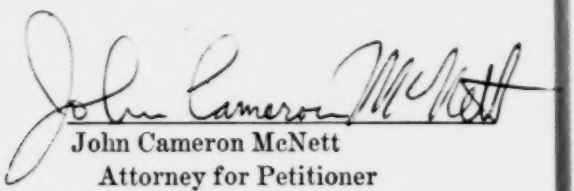
However, it is equally clear that the court below completely failed to address the fundamental question as to whether or not petitioner's invention was shown by evidence presented to actually be a substantially improved product which eliminates needless sickness and death and which reduces the cost of medical care inherent in each and every prior art product. Petitioner's contribution to progress in the useful arts cannot be properly measured without addressing this question.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



John Cameron McNett
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, John Cameron McNett, counsel for Petitioner, hereby certify that I have served nine copies of the foregoing *Petitioner's Reply to Respondent's Memorandum in Opposition* by depositing three copies of the same in the United States Mail, properly stamped and addressed, to each of the following:

C Marshall Dann
Commissioner of Patents and Trademarks
Washington, D.C. 20231

Solicitor General
Department of Justice
Washington, D.C. 20530

Joseph F. Nakamura
Solicitor
U. S. Patent and Trademark Office
Washington, D.C. 20231

This 27th day of April, 1976.

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